IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

SARAH CUNNIFF, Plaintiff, v. COOK COUNTY SHERIFF'S OFFICE, AND COOK COUNTY, Defendant.	Case No. 2014 CH 18780 Calendar 03 Hon. Franklin U. Valderrama

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiff's Motion for Summary Judgment and Defendants' Cross-motion for Summary Judgment. For the reasons that follow, Plaintiff's Motion for Summary Judgment is granted, and Defendant's Cross-Motion for Summary Judgment is granted in part and denied in part.

BACKGROUND

Plaintiff, Sarah Cunniff, is an attorney employed by the Shiller Preyar Law Firm ("Shiller Preyar"). Defendant, Cook County Sheriff's Office (the "Sheriff's Office") is an agency of Cook County (collectively, the Sheriff's Office and Cook County are referred to as "Defendants").

On August 13, 2014, while working as an intern for Shiller Preyar, Plaintiff sent a request pursuant to the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq. ("FOIA") to the Sheriff's Office from her personal email account, requesting the following information pertaining to Officers Eric Reierson and Anthony Sevenson: "[a] complaint register files; [b] Complaint log files; [c] Non-affidavit investigative files; [d] Summary punishment action request files; [e] Non-disciplinary intervention files; [f] Behavior intervention files; [g] Any document created by or in possession of the Office of Professional Review (O.P.R.); [h] any document kept on the Complaint." Pl. Cmplt., at 4.

At the time Plaintiff made the FOIA request, Shiller Preyar was counsel in a pending matter, Wesley v. Reierson, et al., 13-cv-00650, which involved the officers and information subject to Plaintiff's FOIA request. The court in the Wesley matter had entered an order closing discovery by June 2, 2014.

The Sheriff's Office responded to the FOIA request on August 20, 2014. In its response, the Sheriff's Office stated that it was extending its time to respond and that Plaintiff would receive a response by August 27, 2014. On August 29, the Sheriff's Office sent an email to Plaintiff stating that it was again extending its time to respond to Plaintiff's request, as the records were still being generated, and that she would receive a response by September 5, 2014. On September 5, 2014, the Sheriff's Office sent Plaintiff another response via email, which

stated that it expected to have the documents completed by September 8, 2014. In this email, the Sheriff's Office further asked for clarification regarding the Plaintiffs' request for documents about "Anthony Sevenson" as the Sheriff's Office stated that it did not have an employee by such name, but that it had an employee by the name of "Anthony Sevening." Plaintiff responded on the same day that the records she was requesting in fact pertained to Anthony Sevening.

On September 15, 2014, the Sheriff's Office emailed Plaintiff, informing her that the County had been experiencing email connectivity issues delaying their response, and stating that she should expect a response by September 19, 2014. On September 19, the Sheriff's Office emailed Plaintiff once again extending its time to respond and stating that Plaintiff should expect a response on or before September 26, 2014. On October 6, 2014, the Sheriff's Office emailed Plaintiff stating that Cook County experienced a network outage on October 3, 2016 which prevented the Sheriff's Office from contacting Plaintiff, and that she should receive a response to the request on or before October 10, 2014. Plaintiff replied to this email the same day, stating: "Thank you for contacting me. I understand that outages happen. However, I object to any continued extensions. It has been nearly two months since my initial request. Please provide the documents as soon as possible. Thank you." Pl. Resp. Ex. 2.

On October 10, 2014, Plaintiff received a response from the Sheriff's Office denying her FOIA request and refusing to disclose any documents citing several exemptions. The Sheriff's Office further responded that it was denying the FOIA request since it was related to the then ongoing Wesley v. Reierson matter and because FOIA is not a substitute for discovery, citing Appleton Papers, Inc. v. EPA, 702 F.3d 1018 (7th Cir. 2012).

On November 21, 2014, Plaintiff filed a Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint") against the Sheriff's Office and the County of Cook, alleging that the Sheriff's Office had willfully violated FOIA. Plaintiff requested *inter alia*, that the Court enter an order compelling the Cook County Sheriff's office and Cook County to release the documents requested and that it award Plaintiff attorney's fees and costs pursuant to 5 ILCS 140/11.

On September 22, 2015, the Office of the State's Attorney released the records responsive to Plaintiff's FOIA request, stating that it was releasing the records "to conserve judicial resources and dispose of this litigation as efficiently as possible." Def. Resp., Ex. H. The State's Attorney further stated in its letter that since the Wesley matter was settled, the order entered in that matter closing discovery was no longer in effect and thus, Plaintiff's request was "no longer a violation of the use of FOIA as a substitute for discovery." Def. Resp., Ex. H.

Thereafter, Plaintiff filed a motion for summary judgment, and Defendants filed a cross-motion for summary judgment solely on the issue of the request for declaratory relief in the Complaint. Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment are presently before the Court.

MOTION FOR SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012); Safeway Ins. Co. v. Hister, 304 Ill. App. 3d 687, 691 (1st Dist. 1999). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact. Williams v. Covenant Med. Ctr., 316 Ill. App. 3d 682, 689 (4th Dist. 2000). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. Dockery ex rel. Dockery v. Ortiz, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. Id. The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. Medow v. Flavin, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his or her case in response to a motion for summary judgment, he or she must present a factual basis that would arguably entitle him or her to judgment under the applicable law. Pielet v. Pielet, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. Kolakowski v. Voris, 83 Ill. 2d 388 (1980).

Where cross-motions for summary judgment are filed, the parties acknowledge that only a question of law is at issue and invite the court to decide the issues based on the record. Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 309 (2010). However, even where parties file cross-motions for summary judgment, the court is not obligated to grant summary judgment. Mills v. McDuffa, 393 Ill. App. 3d 940, 949 (2d Dist. 2009). It is possible that neither party alleged facts that, even if undisputed, are sufficient to warrant judgment as a matter of law. Id.

DISCUSSION

Plaintiff argues that she is entitled to judgment as a matter of law because: (1) Defendants failed to respond to the FOIA request after the statutorily-provided five (5) day extension had expired; (2) Defendants willfully violated FOIA by unilaterally granting themselves four (4) additional extensions of time to respond to her request; (3) the letter denying Plaintiff's request was insufficient under FOIA; and (4) Defendants improperly denied her FOIA request.[1]

Defendants respond that (1) Defendants reasonably and in good faith sought additional time to respond to the FOIA request and did not willfully violate FOIA; (2) the denial of the FOIA request was reasonable and in good faith; and (3) Plaintiff, as a party, is indistinguishable from Shiller Preyar and is thus, not entitled to attorney's fees. Defendants move for summary

[1] In support of her motion for summary judgment, Cunniff submits: the email exchanges between Cunniff and the Sheriff's Office regarding her FOIA request, Exhibits A-J; the Sheriff's Office's letter to Cunniff denying the FOIA request, Exhibit K; Defendant's Response to Cunniff's Request to Admit to Defendants, Exhibit L; and Cunniff's Affidavit, Exhibit M.

judgment solely on the issue of Plaintiff no longer seeking injunctive relief for the production of records pursuant to the FOIA request.[2] The Court will address the aforementioned issues in turn.

I. *Whether Defendants are entitled to Judgment as Matter of Law*

The Court first addresses the subject of the Defendants' cross-motion for summary judgment. Defendants contend that Plaintiff has abandoned the request for relief seeking to compel the Defendants to release the records subject to her FOIA request. Defendants assert that Plaintiff failed to raise the issue in her motion for summary judgment and that, since they have produced the records subject to Plaintiff's FOIA request, Plaintiff's request for relief is moot.

Plaintiff, on the other hand, argues that the Court should grant summary judgment in her favor because Defendants released the records she requested pursuant to FOIA because of her filing of the present action, and that therefore, the Court should declare her a prevailing party.

Defendants reply that Plaintiff does not address Defendants' motion for summary judgment, and instead focuses on the issue of attorney's fees, which is not the basis of the cross-motion. Defendants assert that they are entitled to summary judgment because all issues, except the issue of attorney's fees are moot, citing Uptown People's Law Center v. IDOC, 2014 IL App (1st) 130161.

The Plaintiff's Complaint in this case sought an "order compelling The Cook County Sheriff's Office and Cook County to release the documents requested to Plaintiff immediately[.]" Pl. Cmplt., Pg. 6, ¶ iii. It is undisputed that Defendants released the information Plaintiff originally requested through FOIA on September 22, 2015, after the present action was initiated.

The issue is whether Defendants are entitled to judgment as a matter of law because they have produced the records Plaintiff originally requested pursuant to FOIA. As noted, *supra*, where cross-motions for summary judgment are filed, the parties acknowledge that only a question of law is at issue and invite the court to decide the issues based on the record. Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 309 (2010).

The Court agrees with Defendants that Plaintiff's request for relief in the form of an order compelling Defendants to issue the requested FOIA information is moot. As Defendants note, Plaintiff has made no argument as to the adequacy of the released information in her motion. Therefore, since Defendants have released the records subject to Plaintiff's FOIA request, and with no argument suggesting otherwise, Plaintiff's request for relief asking that the Court compel Defendants to produce the records is now moot.

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[2] In support of their response/cross motion for summary judgment, Defendants submit: The affidavit of Elizabeth Scannell, Exhibit 1; the email exchanges between Defendants and Plaintiff, Exhibit 2; a transcript of Plaintiff's Deposition, Exhibit A; docket records from the Wesley v. Reierson matter, Exhibit B; a notification of docket entries from the Reierson matter, Exhibits C, E and G; an agreed motion for entry of a protective order in the Reierson matter, Exhibit D; an email exchange between Shiller Preyar and the States' Attorney's Office, Exhibit F; Defendants' letter to Plaintiff denying her FOIA request, Exhibit H, a copy of the Complaint in the present matter, Exhibit I; and Plaintiff's Response to Request to Admit, Exhibit J.

However, the fact that the aforementioned request for relief is moot does not entitle Defendants to judgment as a matter of law, as *there is no question of law* as to whether Defendants released the FOIA information on September 22, 2015. Defendants, for the first time in their reply, suggest that all issues in the present matter—aside from the issue of attorney's fees—are moot because they have released the records. The Court disagrees. All that the release of the FOIA information does—as Defendants themselves acknowledge—is render part of Plaintiff's prayer for relief moot. Her claims for violation of FOIA due to the initial denial of her request, the unilateral extensions of time and attorney's fees are not rendered moot by Defendants' release of the documents subject to the FOIA request.

As such, Defendants' cross-motion for summary judgment is granted to the extent it is based on the premise that they have produced all responsive records to Plaintiff's FOIA request. The motion, however, is denied as to the remaining issues of the Sheriff's Office initial denial of Plaintiff's FOIA request, the requests for extensions of time to respond, and attorney's fees.

II. *Whether Defendants Violated FOIA Through Their Requests for Extensions of Time*

Plaintiff argues that FOIA provides for a public body to either grant or deny a request for public records within five business days after the receipt of a request, and that the statute only allows the public body to request a one-time, five day extension to grant or deny the request. However, Plaintiff alleges that Defendants violated FOIA by unilaterally granting themselves four additional extensions to respond to the request, citing Roxana v. Environmental Protection Agency, 2013 IL App (4th) 120825.

Defendants acknowledge that there was no written agreement for the time extensions they made beyond the initial request for a five-day extension. However, Defendants argue that Plaintiff's failure to respond and the responses she sent to the Sheriff's Office constituted "tacit" acceptance of the extensions. In support of this argument, Defendants submit Plaintiff's responses to the Sheriff's Office's emails from September 5, 2014 and October 6 2014 in which she stated "thank you for your timely attention to this matter," and "I understand that outages happen." Def. Resp. Ex. 2, Pgs. 15-20. Defendants further offer the Affidavit of Elizabeth Scannell, an Assistant General Counsel and FOIA officer for the Sherriff's Office. In her Affidavit, Scannell attests that when the Sheriff's Office requests additional time to compile or review documents pursuant to a FOIA request, requesting parties often do not respond to the communications concerning extensions and that "the Sheriff's Office presumes that extensions are accepted unless otherwise objected to." Def. Resp., Ex. 1, Scannell Aff., ¶ 22.

The Court now turns to the relevant language in FOIA:

> (a) Each public body shall make available to any person for inspection or copying all public records… .
>
> …
>
> (d) Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section.

...

(e) The time for response under this Section may be extended by the public body for not more than 5 business days from the original due date for any of the following reasons:

(ii) the request requires the collection of a substantial number of specified records[.]

...

The person making a request and the public body may agree in writing to extend the time for compliance for a period to be determined by the parties. If the requester and the public body agree to extend the period for compliance, a failure by the public body to comply with any previous deadlines shall not be treated as a denial of the request for the records.

(f) When additional time is required for any of the above reasons, the public body shall, within 5 business days after the receipt of the request, notify the person making the request of the reasons for the extension and the date by which the response will be forthcoming. Failure to respond within the time permitted for extension shall be considered a denial of the request.

5 ILCS 140/3 (a), (d)-(f) (West 2012).

The purpose of FOIA is "'to open governmental records to the light of public scrutiny.'" Watkins v. McCarthy, 2012 IL App (1st) 100632, ¶ 13 (quoting Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65, 128 Ill. 2d 373, 378 (1989)). Thus, under FOIA, "public records are presumed to be open and accessible." Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 233 Ill. 2d 396, 405 (2009). Illinois courts have repeatedly emphasized the fundamental principle of public access to government records that animates the FOIA. FOIA contemplates "full and complete disclosure of the affairs of government and recognizes that such disclosure is necessary to enable the people to fulfill their duties to monitor government." Id. Illinois's FOIA statute was modeled after the federal FOIA statute and case law interpreting the federal statute may guide Illinois courts interpretation of Illinois' FOIA. Hites v. Waubonsee Community College, 2016 IL App (2d) 150836.

In construing a statute, a court's task is to "ascertain and give effect to the legislature's intent," the most reliable indicator of which is "the language of the statute, which is to be given its plain and ordinary meaning." Solon v. Midwest Med. Records Ass'n, 236 Ill. 2d 433, 440 (2010). To determine the plain meaning of statutory terms, a court should "consider the statute in its entirety, the subject it addresses, and the apparent intent of the legislature in enacting it." Id. "When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction." Id. However, a court may consider extrinsic aids of construction if a statute is capable of being reasonably understood in two or more different ways. Id. An ambiguous statute should be construed "to avoid rendering any part of it meaningless or superfluous." Id. at 440-41. A presumption also exists "that the legislature did not intend absurd, inconvenient, or unjust consequences." Id. at 441.

Although Plaintiff does not address this issue, Defendants offer no authority in support of their argument that "tacit" acceptance is sufficient for purposes of FOIA, which clearly provides that any requested extensions additional to the initial five (5) day extension must be approved *in writing* by the parties. 5 ILCS 140/3 (West 2012); Roxana, 2013 IL App (4th) 120825, ¶ 31-35. Plaintiff did not respond to most of the emails sent by the Sheriff's Office. Defendant's interpretation of FOIA is not supported by the plain language of FOIA. If the legislature intended "silence" by the requester to a public body's request for an extension of time to constitute a tacit agreement, FOIA would say so. As it reads, FOIA requires the parties to agree in writing to an extension. Therefore, since FOIA requires written approval by the parties, silence alone cannot constitute approval under FOIA.

Moreover, in the occasions in which Plaintiff responded to the Sheriff's Office, she did not explicitly accept the requests for an extension of time. Plaintiff's first response to the Sheriff's Office, which she made on September 5, 2014, merely clarified the name of Officer Sevening and stated: "thank you for your timely attention to this matter." Def. Resp., Ex. 2. Plaintiff's second response, which she made on October 6, 2014, explicitly rejected any further extensions of time to respond to her request. Def. Resp., Ex. 2.

Even if the Court were to construe Plaintiff's September 5, 2014 response to the Sheriff's Office email as a written "implicit" approval for an extension of time under FOIA, that would leave every other extension by the Sheriff's Office—the explicit extensions and explanations for delay in responding from August 29, 2014, September 15, 2014, September 19, 2014, and October 6, 2014—unauthorized under FOIA. Therefore, the Court finds that, since there was no written agreement by the parties to extend the time to respond beyond the initial five (5) day extension allowed by FOIA, Defendants violated FOIA through their unilateral extensions of time to respond.

III. *Whether Defendants Willfully Violated FOIA*

Plaintiff argues that the four unilateral extensions for compliance with the FOIA request constituted willful violations of FOIA because they evidenced disregard for the provisions of the statute, which only allows for a one-time, five (5) day extension. Plaintiff notes that such willful violations are subject to civil penalties between $2,500 and 5,000 per occurrence. However, Plaintiff does not suggest a specific penalty amount applicable in this case. Defendants counter that the violations were not willful because the requests for extensions of time were made in good-faith and submit Scannell's Affidavit in support of their response. Plaintiff asserts for the first time in her reply, that the ultimate denial of her request also constituted a willful violation of FOIA.

As a preliminary matter the Court notes that, since Plaintiff argues for the first time in her reply, that the ultimate denial of her request constituted a willful violation of FOIA and further fails to develop the argument, the Court will not address this issue.

FOIA states in relevant part:

> (j) If the court determines that a public body willfully and intentionally failed to comply with the Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of this Act.

5 ILCS 140/11 (j) (West 2012).

There is scant authority as to what constitutes a "willful" violation of FOIA for purposes of the imposition of a civil penalty. In Rock River Times v. Rockford Pub. Sch. Dist. 205, the court considered various actions undertaken by a public school which refused to release records pursuant to a FOIA request in deciding whether the FOIA violation was willful. 2012 IL App (2d) 110879. In Rock River, a newspaper (the "Newspaper") sent a FOIA request to the Rockford Public School District (the "School") requesting that it release a letter sent by a principal to a superintendent. Id. at ¶3. The School denied the FOIA request citing two exemptions. Id. at ¶ 4, 5. The office of the Public Access Counselor reviewed the two exemptions claimed by the School, opining that one of them did not apply, and not issuing an opinion as to the second exemption. Id. at ¶ 4. The School later acknowledged that the second exemption was also not applicable, and offered to reconsider its decision not to disclose the records. Id. at ¶¶ 6-7. At this time, however, the School claimed a third exemption as a possible basis for denial of the request. Id. at ¶ 7. The Newspaper filed a complaint against the School. Id. at ¶ 3. The trial court found that the continued withholding of the letter was a willful violation of FOIA, after the School had conceded that the first two exemptions it claimed were inapplicable: "the school's course of conduct, viewed in its totality, reflected a lack of good faith in responding to the newspaper's request." Id. at ¶ 23. The Appellate Court upheld the trial court's ruling that the school willfully violated FOIA. Id. at ¶ 54.

FOIA requires that the conduct of the public body be willful or otherwise in bad faith in order to impose a penalty. Under Rock River Times, willfulness for purposes of imposing a civil penalty under FOIA is a factual determination to be made from the totality of the public body's conduct. See Id. at ¶ 51-54. The court in Rock River Times did not define what constitutes "willful" under FOIA and FOIA itself does not provide a definition for the term. Therefore, in the absence of a definition in a statute a court may look to the popular meaning of a term. People v. Ex rel. Daley v. Datacom Sys. Corp., 146 Ill. 2d 1,*15 (1991). Black's Law Dictionary defines willful in part as:

> Voluntary; knowingly; deliberate... Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification... An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's Law Dictionary 1599 (6th ed. 1990).

Applying the plain meaning of the word "willful," the public body's conduct must evidence an intentional disregard of the provisions of FOIA for the conduct to constitute a willful violation. Moreover, the legislature's choice to use the disjunctive "or" in the context of whether the "public body willfully and intentionally failed to comply with the Act, ***or*** otherwise acted in bad faith" demonstrates that it is not necessary that the public body act in bad faith in order for its actions to fall within the provision. 5 ILCS 140/11 (j) (West 2012).

Defendants offer Scannell's Affidavit in support of their contention that the unilateral extensions of time were made in good faith. In her Affidavit, Scannell states that Plaintiff failed to call or respond via email regarding several of the emails Scannell sent Plaintiff providing updates about her FOIA request. Def. Resp. Ex. 1, Scannell Aff., ¶ 4-14. Scannell attests that she denied Plaintiff's request pursuant to her review of the docket in the Wesley matter, which revealed that discovery had been closed in the case as of June 2, 2014. Def. Resp. Ex. 1, Scannell Aff., ¶ 19. Scannell further states that Plaintiff's request included broad terminology, resulting in large records being potentially responsive to her request. Def. Resp. Ex. 1, Scannell Aff., ¶ 21. Scannell further attests that when the Sheriff's Office requires additional time to review documents, requestors usually do not respond to communication concerning extensions, and that due to the large volume of requests the Sheriff's Office processes, it presumes that the extensions are accepted unless the requesting party objects. Def. Resp. Ex. 1, Scannell Aff., ¶ 22.

The Court finds that the Sheriff's Office willfully violated FOIA by failing to adhere to the requirement that any additional requests for an extension of time beyond the first five (5) day extension be approved in writing by the parties. Scannell's Affidavit does not suggest that the Sheriff's Office was unaware of FOIA's requirements; the only explanation offered for the unilateral extensions is that the Sheriff's Office receives a large volume of requests and as such, the Sheriff's Office usually assumes the requests for extensions are accepted unless the requesting party objects. This mode of conduct constitutes a willful violation of the express requirements of FOIA.

Therefore, the Court finds that the unilateral extensions of time by the Sheriff's Office constituted willful violations of FOIA. Plaintiff asserts that the Sheriff's Office made four (4) unauthorized, unilateral extensions of time to respond to her request. However, the Court finds that Plaintiff has provided no evidence to support her contention that the Sheriff's delay in responding to her request on September 5, 2014 and October 6, 2014 were the result of a willful unilateral extension. These delays, according to the Sheriff's Office, were due to a network outage and email connectivity issues. In support of this assertion, Defendants submit Scannell's Affidavit. Def. Resp., Ex. 1, ¶¶ 9, 15. Since Plaintiff offers no evidence to rebut the Sheriff's Office explanation for the delay in responding on September 5, 2014 and October 6, 2014, the Court finds that the Sheriff's Office willfully violated FOIA only as it concerns its unilateral requests for extensions of time made on August 29, 2014, and September 19, 2014.

Moreover, although Plaintiff argues that the unilateral extensions of time to respond by the Sheriff's Office are subject to a civil penalty in an amount between $2,500 and $5,000,

Plaintiff does not suggest the appropriate civil penalty amount applicable in the present case. As such, the Court awards the minimum penalty of $2,500 per each of the two unilateral extensions by the Sheriff's Office beyond the initial five (5) day extension allowed by FOIA, which the Sheriff's Office made on August 20, 2014.

IV. *Whether The Sheriff's Office's Denial of Plaintiff's Request Was Improper Under FOIA*

Plaintiff argues that the Sheriff's Office did not provide a detailed factual basis for the application of the exemptions cited in the letter denying her FOIA request. Plaintiff asserts that listing eight inapplicable exemptions and citing a Seventh Circuit Case which is not analogous to the present matter to support a claim that FOIA is not substitute for discovery, does not constitute a sufficient factual basis for the denial as required by FOIA and as such, the denial of her request was improper.

Defendants counter that their denial of Plaintiff's request was proper, and that the denial letter complied with FOIA's requirements, as it listed the applicable statutory citations, the reason for the denial, provided authority applicable to the decision, and informed Plaintiff of the person responsible for the denial and her right of judicial review.

Plaintiff replies that the Sheriff's Office's assumption that Plaintiff's request attempted to circumvent the discovery order entered in the Wesley case was erroneous, and therefore, there was no basis for the Sheriff's Office to deny her request.

As an initial matter, the Court finds that the denial of Plaintiff's request presents two issues. The first issue is whether the denial letter contained a sufficient factual basis as required by FOIA. The second issue is whether the denial of Plaintiff's request itself was proper. The Court will address each issue in turn.

FOIA states in relevant part:

> (a) Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. Each notice of denial by a public body shall also inform such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act.

5 ILCS 140/9 (a) (West 2012).

The letter sent by the Sheriff's Office denying Plaintiff's request cites FOIA exemptions 7(1)(a); 7(d)(i),[3] (ii), (iii), (iv), (v); 7(1)(f) and 7(1)(n) as bases for the denial. Pl. Mot., Ex. K.

[3] The Court notes that this exemption was cited in the Sheriff's Office's denial letter as "7(d)(i)." However, although the parties do not address this issue, the Court finds that the correct citation to the exemption is "7(1)(d)(i)."

The letter further states: "The records you are seeking are directly related to the allegations before the court in the case of Wesley v. Reierson et al, Case No. 13-cv-00650. FOIA is not a substitute for discovery. *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1027 (7th Cir. 2012)." Pl. Mot., Ex. K.

The Court finds that the denial letter provided sufficient factual basis for the denial of Plaintiff's request. The letter clearly states that the reason for the denial included the exemptions listed, and specifically, the relationship between the request and the ongoing Wesley matter.

The Court next addresses whether the denial of Plaintiff's request in was proper. The FOIA exemptions listed in the denial letter state as follows:

> (1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:
>
> > (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.
> >
> > ...
> >
> > (d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:
> >
> > > (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request;
> > >
> > > (ii) interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request;
> > >
> > > (iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;
> > >
> > > (iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request;
> > >
> > > (v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal

documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request;

...

(f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

...

(n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

735 ILCS 140/7 (1)(a), (d)(ii)-(v), (f), (n) (West 2012).

Plaintiff argues that the exemptions cited by the Sheriff's Office were inapplicable to this case, and that the case cited by the Sheriff's Office in support of its denial of her request is inapplicable, citing Appleton Papers, 702 F.3d 1018 (7th Cir. 2012). Plaintiff further contends that the denial of her request was improper because she was not a party to the Wesley matter and as such, she was not bound to the discovery order in that case. Alternatively, Plaintiff posits that even if she were a party, there is no provision under FOIA prohibiting parties from requesting records under FOIA. Plaintiff submits her own deposition testimony in support of her arguments.

Defendants assert that Plaintiff and Shiller Preyar have interests in common, and as such, the denial of her FOIA request was proper because Plaintiff was a party to the ongoing Wesley mater. Defendants argue that allowing a defendant to obtain discovery through FOIA would be a violation of separation of powers in Article I, Section 2 of the Illinois Constitution, citing Best v. Taylor Mach. Works, 179 Ill. 2d 367 (1997) and Lebron v. Gottlieb Mem. Hosp., 237 Ill. 2d 217 (2010). Defendants further argue that FOIA is not a discovery tool, citing NLRB v. Robbins Tire & Rubber, 437 U.S. 214, 252 (1978). In support of this contention, Defendants offer Plaintiff's deposition testimony.

Plaintiff replies that she was not a party to, and that that she had no knowledge of the ongoing Wesley matter. She further states that her only interest in the FOIA request was self-improvement.

"If the public body seeks to invoke one of the exemptions in section 7 [of FOIA] as grounds for refusing disclosure, it is required to give written notice specifying the particular exemption claimed to authorize the denial." Ill. Educ. Ass'n v. Ill. State Bd. of Educ., 274 Ill. Dec. 430, 435 (2003) [citing Lieber v. Bd. of Trs. Of S. Ill. Univ., 176 Ill. 2d 401, 408 (1997)]. If the party seeking disclosure of information under FOIA challenges a public body's denial in the circuit court, the burden is on the public body to prove that the information requested falls within

the exemption it has claimed. Ill. Educ. Ass'n., 274 Ill. Dec. 430 at 435. Therefore, although the initial burden of proof in a motion for summary judgment is on the movant, "in order to prevail on a motion for summary judgment *in a FOIA case*, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." Bluestar Energy Servs. v. Ill. Commerce Comm'n., 374 Ill. App. 3d 990, 996 (1st Dist. 2007) (emphasis added). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." Id. [citing Carney v. United States Dept. of Justice, 19 F.3d 807, 812 (2d Cir. 1994)]. As such, the burden in this matter lies with the Sheriff's Office to present a reasonable explanation why the withheld documents fall within the exemptions claimed in its denial letter.

As a preliminary matter, the Court notes that neither Plaintiff nor Defendants develop any arguments as to whether the exemptions cited by the Sheriff's Office as bases for the denial of Plaintiff's FOIA request were applicable or inapplicable. Plaintiff merely asserts that the exemptions were not applicable, without developing the argument. Worse yet, Defendants do not address the exemptions in their response.

The only explanation offered by Defendants as to why Plaintiff's FOIA request was denied was that the order entered in the Wesley matter closed discovery and that Plaintiff's employer, Shiller Preyar, sought records from the Wesley case, which they were barred from seeking pursuant to the discovery order that was entered in that case. As such, Defendants assert that Shiller Preyar, through Plaintiff, used FOIA as an alternative to discovery. To this point, Scannell attests in her affidavit that she "sent an email to [Plaintiff], with a response to her FOIA request, denying the request and stating, in part that 'the records [Plaintiff was] seeking are directly related to the allegations before the court in the case of *Wesley v. Reierson*...'" Def. Resp. Ex. 1, Scannell Aff., ¶ 18. Additionally, Scannell states in her affidavit that the Sheriff's Office denied Plaintiff's request in keeping with the court's order in the Wesley matter closing discovery. Def. Resp. Ex. 1, Scannell Aff., ¶ 19.

The Court finds that Defendants have failed to satisfy their burden to show that the withheld documents fall within an exemption to FOIA. As noted above, neither Scannell's affidavit nor Defendants' response address how any of the claimed exemptions apply in the present case. Defendants merely argue repeatedly that FOIA is not a substitute for discovery, and that Plaintiff was a party to the Wesley matter.

However, even if the Court were to assume that Defendants' argument is, in essence, that the aforementioned exemptions apply based on their argument that Plaintiff was a party to the Wesley matter and improperly sought discovery through FOIA, that argument still fails. Plaintiff submitted the FOIA request using her personal email. Plaintiff's email making the FOIA request to the Sheriff's Office does not contain any information revealing that Plaintiff was an intern for Shiller Preyar or that she had a connection to Shiller Preyar. See Def. Resp., Ex. 2. Moreover, there is no evidence before the Court, and Defendants have not argued, that the Sheriff's Office learned that Plaintiff was associated to Shiller Preyar at the time her request was denied.[4] In sum,

[4] Defendants assert that the Court in the Wesley matter entered an agreed protective order governing production of the FOIA information through discovery in the Wesley matter, and provide such order in support of their response.

Defendants have made no explicit argument, nor is there any evidence stating that Defendants learned of Plaintiff's relationship to Shiller Preyar at the time the FOIA request was made.

As such, the Court finds that the Sheriff's Office improperly denied Plaintiff's FOIA request.

V. *Whether Plaintiff is Entitled to Attorney's Fees*

Plaintiff's prayer for relief includes the award of attorney's fees in this action. Plaintiff argues that, since Defendants have produced the records that were subject to her FOIA request, she should be declared the prevailing party in this matter and awarded attorney's fees.

Defendants contend, however, that Plaintiff is not the prevailing party in this matter and that she is not entitled to attorney's fees. Defendants note that there is a split in the Appellate Courts as to whether a prevailing party in the FOIA context is determined by whether that party prevailed in its FOIA request, or whether there was court-ordered relief awarded, citing Uptown; and Rock River Times. Defendants, however, do not argue whether the Court should follow Uptown or Rock River Times.

Nevertheless, Defendants assert that Plaintiff, as an attorney proceeding *pro-se* is not entitled to attorney's fees, citing Hamer v. Lentz, 132 Ill. 2d 49, 63 (1989). The essence of Defendants' argument is that because Plaintiff is represented by the firm that she works for, she is a *pro-se* attorney. Defendants maintain that, the purpose of granting attorney's fees in a FOIA case is to encourage parties to seek legal advice, and that *pro-se* attorneys not spending funds pursuing such FOIA requests, are therefore not entitled to legal fees, citing Uptown People's Law Center v. IDOC, 2014 IL App (1st) 130161; and In re Marriage of Tantiwongse, 371 Ill. App. 3d 1161, 1164-1165 (2007). Defendants further contend that Uptown is dispositive of this issue, and that Plaintiff's deposition supports the contention that Plaintiff and Shiller Preyar should be considered to have a unity of interests.

Plaintiff replies that her only interests in filing the FOIA request were her own self-interest and education, and as such, there was no unity of interests between her and Shiller Preyar at the time she made the FOIA request. Plaintiff cites her deposition testimony in support of this argument and as such, concludes she should be awarded attorney's fees.

The threshold issue in deciding whether Plaintiff is entitled to attorney's fees is whether she is a prevailing party in this matter. If Plaintiff is a prevailing party, then she is entitled to her attorney's fees in the absence of applicable precedent precluding the award of attorney's fees. The next issue is whether, there is applicable precedent precluding the award of attorney's fees to Plaintiff. The Court now turns to address each issue.

However, the Order merely states: "Defendant's agreed motion for protective order is granted." Def. Resp. Ex., E. Although Defendants further provide the Defendant's Agreed Motion for a Protective Order and the Parties Agreed Confidentiality Order in the Wesley matter, it is unclear what the significance of these documents is in relation to Cunniff's FOIA request, as Defendants have not developed this argument.

The relevant language in FOIA states as follows:

> (i) If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorney's fees and costs. In determining what amount of attorney's fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought. The changes contained in this subsection apply to an action filed on or after January 1, 2010.

735 ILCS 140/11 (i) (West 2012).

In Rock River Times, the Second District Appellate Court held that the intent of the Illinois legislature was to require "nothing less than court-ordered relief in order for a party to be entitled to attorney's fees" due to its change in the wording of the Illinois FOIA statute from the federal version of the FOIA statute, which holds that a party must *substantially prevail* to be entitled to attorney's fees. Rock River Times, 2012 IL App (2d) 110879, ¶40 (emphasis added). The First District Appellate Court in Uptown, however, found that Rock River Times was wrongly decided. Uptown, 2014 IL App (1st) 130161, ¶ 20. The First District Appellate Court stated: "while we agree with the Second District that 'substantially prevails' was modified to 'prevails' to deliberately effectuate a change, we find the modification was intended to ensure that successful plaintiffs could obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight." Id. The First District Appellate Court found "no indication that the legislature intended to abandon Illinois' policy of awarding fees under FOIA despite the absence of a court order... ." Id. at 21.

Illinois appellate court decisions, regardless of what district, are binding on this Court if there is no conflict between districts. See People v. Harris, 123 Ill. 2d 113, 128 (1988); Aleckson v. Round Lake Park, 176 Ill. 2d 82, 92 (1997). When conflicts between the district courts arise, however, "the circuit court is bound by the decision of the appellate court of the district in which it sits." Aleckson, 123 Ill. 2d at 128. Accordingly, this Court is bound to follow Uptown's precedent as it relates to the First District Appellate Court's interpretation of the "prevailing party" requirement under FOIA for purposes of the award of attorney's fees.

Since Defendants produced the records subject to Plaintiff's FOIA request the Court finds that Plaintiff is the prevailing party.

However, the Court's inquiry does not end here. As mentioned, *supra*, the Court must decide whether Plaintiff is entitled to attorney's fees despite being a prevailing party. In Illinois, a *pro-se* attorney is not entitled to an award of attorney's fees under FOIA. Hamer, 132 Ill. 2d 49, 63 (1989). The Illinois Supreme Court in Hamer reached this conclusion by evaluating the legislative history of the Illinois FOIA fee provision, which showed that the purpose of such provision was, in part, "to ensure the enforcement of the FOIA [which] is accomplished by removing the burden of legal fees... We do not think the provision was intended as either a reward for successful plaintiffs or as a punishment against the government." Id. at 61-62.

Other Illinois cases have extended Hamer's reasoning to apply in other factual scenarios. In Brazas v. Ramsey, the appellate court, following Hamer, held that a non-attorney *pro-se* litigant is not entitled to attorney's fees. 291 Ill. App. 3d 104, 110 (2d Dist. 1997). In Uptown, the court extended Hamer's reasoning to apply to a legal entity employing its own attorneys to pursue FOIA requests. Uptown, 2014 IL App (1st) 130161. In Uptown, the appellate court held that "a non-for-profit legal organization [is prohibited] from being awarded legal fees that were not actually incurred in pursuing a FOIA request on the organization's behalf." 2014 IL App (1st) 130161, ¶ 25. In Uptown, therefore, the fact that the plaintiff, Uptown, assigned its own attorneys to pursue the FOIA requests on Uptown's behalf, was sufficient for the court to find that although, Uptown was not a *pro-se* attorney, it was nonetheless not entitled to attorney's fees. Id.

In this case, Plaintiff is neither a *pro-se* attorney nor a *pro-se* non-attorney; it is undisputed that Plaintiff is represented by attorneys Stephen Berrios and Rasheda Jackson from Shiller Preyar, and as such, the issue at hand is distinguishable from Hamer and Brazas. Additionally, Plaintiff is not a legal entity being represented by its own attorneys, and therefore, the present case is also distinguishable from Uptown.

Moreover, Plaintiff's testimony established that Shiller Preyar did not request that she pursue the FOIA request for the benefit of Shiller Preyar. Defendants, on the other hand, offer no evidence to contradict Plaintiff's testimony. As such, the Court disagrees with the Sheriff's Office that Uptown is analogous to this case. In other words, the limitation placed on the attorney's fees provision in Uptown does not apply in the present case because unlike in Uptown, there is no evidence, other than circumstantial evidence offered by Defendants, to support their proposition that Plaintiff and Shiller Preyar had a "unity of interests," and therefore, that the Uptown limitation on attorney's fees should apply.

To summarize, the Court finds that none of the aforementioned exceptions to the attorney's fees provision in FOIA apply and that Plaintiff, as the prevailing party, is entitled to attorney's fees.

CONCLUSION

For the aforementioned reasons, Plaintiff's Motion for Summary Judgment is granted. Defendants are subject to $5,000 in civil penalties for their willful violations of FOIA. Plaintiff is instructed to file a fee petition. Defendants' Cross-motion for Summary Judgment is granted in part and denied in part.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSES VALDERRAMA-1968
MAR 14 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama
Judge Presiding

DATED: March 14, 2017